

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original

*Affidavit of
Mailing*

74-1603

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P/S*

To be argued by
GAVIN W. SCOTTI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1603

UNITED STATES OF AMERICA,

Appellee,

—against—

WINCEL HENDRIX,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

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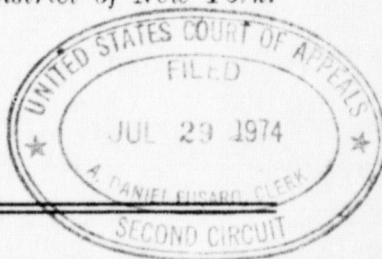


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BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Wincel Hendrix was tried on Counts One and Two of a three count indictment.* Counts One and Two charged possession with intent to distribute approximately 794.3 grams of cocaine and approximately 915.7 grams of marijuana respectively, each in violation of Title 21, United States Code, Section 841(a)(1).

After a jury trial before the Honorable Jacob Mishler in the United States District Court for the Eastern District of New York, Hendrix was found guilty of Counts One and Two. On May 3, 1974, appellant was sentenced to ten years imprisonment and a special parole term of 5 years

* Count Three was dismissed upon motion of the Government prior to trial.

on Count One and to 5 years imprisonment and a special parole term of 5 years on Count Two, the sentences to run concurrently.*

On this appeal, appellant does not question the sufficiency of the evidence against him, but challenges the District Court's consideration of appellant's testimony at trial in determining sentence. Secondly, appellant claims that certain conduct of the District Court evidenced prejudice against him thereby denying him a fair trial.

Statement of Facts

(1)

On the evening of June 22, 1973, members of the New York Joint Task Force (currently the New York Drug Enforcement Task Force) stationed themselves in the vicinity of 94th Street in Elmhurst, Queens, armed with a warrant for the arrest of appellant Hendrix.** At approximately 8:30 P.M., Hendrix was observed at that location while carrying a paper bag and hailing a taxi. Hendrix was immediately arrested by Sergeant George McAndrews and advised of his *Miranda* rights. A pat down for weapons then revealed a roll of \$779 in currency (Gov't Exhibit 19) and the paper bag Hendrix was carrying was discovered to contain numerous packages of man-

* The sentences also were ordered to run concurrently with a prior 3 year sentence imposed in the Southern District on February 21, 1974 upon a conviction for the sale of heroin. Appellant is presently serving this sentence.

** The arrest warrant was issued in the Southern District of New York and involved an unrelated case which culminated in the conviction of appellant for the sale of heroin. Prior to the commencement of the trial in the Eastern District of New York, appellant was sentenced to three years imprisonment.

nite, a substance commonly used as a dilutant for narcotics (Gov't Exhibits 20, 20A; 12:97-98, 104, 108-18, 136-43).*

In the meantime, other agents of the Task Force had arrived at appellant's nearby home at 2346 97th Street in Elmhurst armed with a search warrant for the premises (12:143-48; 13:56). By the time the agents had secured these premises, appellant was brought into the house by the arresting officers and detained in a basement bedroom under the watchful eye of Sergeant McAndrews (12:118, 149). The search of the house commenced in the master bedroom where the following items were seized: a scale and measuring pan located on a bedside table; approximately two pounds of marijuana secreted in a brown shopping bag; more than a pound of cocaine in a white shopping bag which also contained two pounds of mannite and two measuring spoons; a grey suitcase found near the bed containing more mannite, a partially filled bottle of lactose, two strainers, a measuring spoon, and two rolls of aluminum foil; a metal box containing currency and coins amounting to \$3,079.50, a holster and many .38 caliber cartridges; and approximately 4 grams of cocaine wrapped in tin foil in a jewelry box on the dressing table (Gov't Exhibits 24, 21, 11A-C, 12A, 23, 13A, 25, 25A-E, 14A, 26, 27, 15A; 12:149-53; 13:3-20, 24-25, 29-34).

During the search, McAndrews directed a searching officer to remove any loose mirrors located behind the basement bar to check for contraband. Hendrix objected to the removal of the mirrors and explained that the installation of the mirrors was costly and that the agents already had everything in the house (12:48, 55, 128; 13:11-12, 100; 14:3-6).

* References to the trial transcript are made as follows: the number preceding the colon refers to the date in March of the transcript; the numbers following refer to pages of that transcript.

The continued search of the house revealed approximately two grams of marijuana wrapped in a napkin in a kitchen drawer and eleven marijuana cigarettes in the basement bedroom (Gov't Exhibits 17A, 18A; 13:34-6).

The search of appellant's home was conducted between 9:00 p.m. and 11 p.m. During this period, Mrs. Hendrix and about twenty other persons arrived at the Hendrix residence at different times. These persons were detained until the search was completed (13:38, 45).

Appellant was then taken to the office of the New York Joint Task Force at 201 Varick Street, Manhattan, where he was processed at approximately 12:30 a.m. on June 23, 1973. Following standard procedure, Detective Robert Ryan made an inventory search of the appellant and found 2.4 grams of cocaine wrapped in tin foil as well as six marijuana cigarettes in appellant's left front shirt pocket (Gov't Exhibits 9A, 10A; 13:66-69).

Later on the same day, Hendrix was taken to the office of Assistant U.S. Attorney Viviani.* After advising Hendrix of his *Miranda* rights, Viviani stated that three-quarters of a "kilo" of cocaine had been found at appellant's residence. Hendrix responded, saying, "No, I think it was more like a half (12:23; 13:117, 175)." Subsequent chemical analysis indicated that the cocaine seized from the Hendrix residence amounted to approximately one half of a kilogram (Gov't Exhibits 13A, 15A; 12:82-3, 89).

(2)

Appellant testified at trial that although he had "tried" cocaine and marijuana, he did not use them regularly and

* Mr. Viviani is an Assistant in the Southern District of New York whose jurisdiction over the appellant related to the above noted Southern District arrest warrant.

that he had no knowledge of the cocaine, marijuana and paraphernalia found in his master bedroom. He knew of no one in his household who used cocaine or marijuana but did volunteer that a relative of his wife who sometimes stayed in his home was on a methadone program. Hendrix also testified that he had never purchased mannite and that when arrested he was merely delivering the mannite in his possession to a friend named John. According to Hendrix, John had arranged a meeting between someone named Bob and Hendrix at a gas station on Astoria Boulevard. Bob transferred the mannite to Hendrix who was in turn delivering it to John (13:74, 77, 88-9, 93-95, 105-113).

Appellant stated that he had been employed as a "garage man and parking attendant" for sixteen years working steadily until 1972 when he "was out of work for a while."* Hendrix also testified that, comencing in 1966, he purchased a new Cadillac automobile every two years through 1972 financing such cars with cash down payments, trade-ins and time payments. In addition, appellant purchased his Elmhurst home in November of 1972 for \$64,000 making a \$36,000 down payment. The down payment consisted of a \$10,000 certified check and \$26,000 in currency (13:81, 101, 121-23, 136-40).

According to appellant's wife, who also testified, the down payment was partially raised from relatives (\$10,000) and from winnings derived from betting a number (\$12,000). However, Mrs. Hendrix also testified on both direct

* Copies of appellant's joint and individual tax returns for the years 1966 through 1971 reflected the following total reported gross incomes:

1966 — \$6,337.00	1968 — \$6,396.10	1970 — \$7,706.60
1967 — \$6,272.34	1969 — \$6,191.00	1971 — \$7,065.08

Hendrix also testified he had not filed a return for 1972 as of the date of his testimony, March 13, 1974. (Gov't Exhibits 28-33, 13:123-28, 132-36).

and cross-examination that she "hit the number" in 1973. The prosecutor then asked, "You used the money that you won in 1973 for a down payment on a house in 1972; is that your testimony?" At this point the witness changed her testimony stating that she may have won the \$12,000 before November of 1972 (13:145-46, 150-60).

Mrs. Hendrix also testified that \$3,060 found by the agents in her bedroom had been sent to her by a brother in Atlanta, Georgia. She testified that her brother periodically sent her money to purchase clothing in New York for a boutique she and her brother owned in Atlanta, Georgia (13:146-48).

However, on cross-examination, Mrs. Hendrix was unable to specify any of the stores at which she purchased clothes for the boutique (13:148, 160-68, 171-73). At this point, the District Court suggested to Mrs. Hendrix that she might call her brother in Atlanta for this information. Following a brief recess, the cross-examination of Mrs. Hendrix continued and she advised that she was unable to reach her brother at the store and that she did not know where in Atlanta he lived (13:167-171, 173-74).

As noted above, the jury found appellant guilty of both counts in the indictment (14: 75). At sentencing, Judge Mishler indicated that he was convinced that appellant had made substantial profit from illegal narcotic activities over a period of years and that he had perjured himself when he took the stand. Chief Judge Mishler stated further:

I think defendants should be encouraged to take the witness stand but when they take the witness stand I think they must understand that there is a certain risk they take, they better tell the truth.

I feel I added about two years for perjury during the trial in my sentence.*

* Minutes of Sentencing, May 3, 1974, pages 5-6.

ARGUMENT

POINT I

The sentence imposed by the District Court was proper.

Appellant first claims that Chief Judge Mishler abused his discretion and violated appellant's constitutional rights by noting that among the factors considered in determining sentence was appellant's patently unbelievable testimony at trial.

Appellant does not claim that the ten year sentence imposed was unduly harsh or that the District Court adopted a fixed or mechanical approach to the sentencing. Instead, it is simply urged that it was improper for Chief Judge Mishler to consider in weighing sentence what he termed "the most outrageous situation of perjury in any trial that I have witnessed, and the thirteen some odd years I have been on the bench. . . ." (Minutes of Sentencing, May 3, 1974, page 5).

Several Circuits have had the opportunity to consider whether a sentencing judge may properly consider the perjurious testimony of a defendant as bearing on the defendant's character. In *Humes v. United States*, 186 F.2d 875, 878 (10th Cir. 1951), the Court concluded:

It was entirely proper for the court in imposing sentence on [the defendant] to consider the character of [the defendant] as shown by the fact that he committed perjury and induced [a defense witness] to commit perjury. Certainly, the attitude of a convicted defendant with respect to his willingness to commit a serious crime and to induce another to commit a like crime is a proper matter to consider in determining what sentence shall be imposed within the limitations fixed by statute.

In more convincing terms, the Sixth Circuit observed that "in some such instances the conclusion that the defendant has committed perjury may be inescapable, a circumstance a sentencing judge might well be censured for ignoring." *United States v. Wallace*, 418 F.2d 876, 878 (6th Cir. 1969), *cert. denied*, 397 U.S. 955 (1970). Chief Judge Mishler's conclusion that Hendrix had committed perjury was truly inescapable. His testimony could not be reconciled with the jury's verdict. For example, faced with overwhelming evidence that he was engaging in a large volume, profitable drug enterprise, appellant offered only blanket denials. He claimed to know nothing about the significant quantities of narcotics and paraphernalia discovered in his own bedroom, but he did suggest that his wife's cousin (Vera Johnson) might have been responsible. To explain the mannite he was caught carrying, Hendrix introduced the mysterious "Bob" and "John" and claimed to be merely a conduit between the two. Hendrix' protestations of innocence were irreparably undermined by the evidence of his meager earnings as compared with his rather comfortable lifestyle.* Coupled with Mrs. Hendrix' obviously fabricated testimony, including her preposterous explanation that she "hit a number" for \$12,000 in 1973 and used the money toward the purchase of a house in 1972, the defense presented a patently false picture which the jury was perfectly justified in rejecting with no difficulty. Equally justified was Chief Judge Mishler's consideration of Hendrix' testimony as reflecting the character of the man before him for sentencing. *United States v. Levine*, 372 F.2d 70, 74 (7th Cir.), *cert. denied*, 388 U.S. 916 (1967).

* Hendrix admitted that he purchased a new Cadillac every two years from 1966 through 1972 and purchased a \$64,000 home making a \$36,000 cash down-payment in 1972, during the time he was reporting a gross income of between six and seven thousand dollars and supporting a family of seven. Hendrix did not file a 1972 income tax return.

See *United States v. Moore*, 484 F.2d 1284, 1287 (4th Cir. 1973); *United States v. Cluchette*, 465 F.2d 749, 754 (9th Cir. 1972). As this Court has noted recently, the sentencing judge "may exercise a wide discretion in the sources and types of information used to assist him in determining an appropriate, just and enlightened sentence." *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970), citing *Williams v. New York*, 337 U.S. 241 (1949).

It is to some degree understandable that the foregoing authorities were not presented to this Court in appellant's brief. Somewhat perplexing, however, is appellant's reliance on *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969). Although *Scott* presents a similar picture in the sense of a sentencing judge convinced that the defendant before him had "deliberately lied," it is clear that the opinion directing a remand to the District Court for resentencing was necessitated by the concern that the trial judge had imposed a harsher sentence upon the defendant as the price for the defendant's maintaining his innocence, standing trial and refusing at the moment of sentence to admit his guilt.* Judge Mishler exacted no such price. *United States v. Hayward*, 471 F.2d 388, 390 (7th Cir. 1972).

This Court has held on more than one occasion that the sentencing judge may consider evidence of other crimes for which the defendant was neither tried nor convicted. In such a case, *United States v. Doyle*, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965), the observations of Judge Friendly are particularly applicable to the case before this Court.

* It should also be noted that in the *Scott* case an 18-year old defendant had been sentenced by the District Court to the maximum 5-15 year term of imprisonment for robbing a bus driver with a toy pistol.

The aim of the sentencing court is to acquire a thorough acquaintance with the character and history of the man before it. Its synopsis should include the unfavorable, as well as the favorable, data, and few things could be so relevant as other criminal activity of the defendant, particularly activity closely related to the crime at hand. Counsel suggests that although a 'criminal record' may be considered, crimes not passed on by a court are beyond the pale, but we see nothing to warrant this distinction . . . Of necessity, much of the information garnered by the Probation Officer will be hearsay and will doubtless be discounted accordingly, but the very object of the process is scope and the defendant is always guarded by the statutory maximum. To argue that the presumption of innocence is affronted by considering unproved criminal activity is as implausible as taking the double jeopardy clause to bar reference to past convictions.

(Citations omitted.) See also *United States v. Cifarelli*, 401 F.2d 512 (2d Cir.), *cert. denied*, 394 U.S. 908 (1968). It is interesting to note in conclusion that in considering Hendrix' perjured testimony Judge Mishler did not have to rely on any hearsay statement or observation by a Probation Officer. Instead the evidence was presented directly to him by appellant himself and the Chief Judge's conclusion that the testimony was false was confirmed by the jury's verdict. *United States v. Sweig*, 454 F.2d 181, 184 (2d Cir. 1972).

POINT II**The conduct of the District Court in no way prejudiced appellant.**

Appellant next argues that he was prejudiced by the conduct of Chief Judge Mishler during the cross-examination of Mrs. Hendrix. Mrs. Hendrix had testified during direct examination that approximately \$3,060 discovered in her bedroom by the arresting officers had been sent to her by her brother in Atlanta with whom she co-owned a boutique. She explained that her brother periodically sent money to her in New York so she could purchase clothes to be shipped to and eventually sold at the Atlanta shop. When the prosecutor attempted on cross-examination, albeit unsuccessfully, to elicit the names of the stores where she made purchases or records of such transactions, she became vague and generally unresponsive and in fact was able to provide only one store name with no address. During this portion of the cross-examination, the following exchange took place:

Q. You don't remember the name of any of these stores? A. No, but I can get them.

Q. How can you get them? A. I have to call my brother.

Q. Your brother has them? A. I send the bills to him.

The Court: Would you like a short adjournment so you can call your brother. You may step down. We'll take a ten minute recess.

The Witness: The store is not open today and I'll call—

The Court: Step down and do the best you can. We'll take a ten minute recess.

(Whereupon jurors were excused from the courtroom.) (13:167-68).

In pursuing his argument, appellant characterizes the statements of Chief Judge Mishler as a "direction . . . made in the presence of the jury . . . [which made] . . . clear to all present in the courtroom . . . that the Judge disbelieved Mrs. Hendrix' testimony and . . . was seeking to discredit her." (Appellant's brief, page 23.) This characterization of Judge Mishler's inquiry which was made in the presence of the jury is simply not supported by the record. Appellant focuses not on the words of Judge Mishler as delivered in the presence of the jury but rather on the appropriately strong admonition to Mrs. Hendrix after the jury had been excused. The repeated reference to Judge Mishler's statements to Mrs. Hendrix outside the presence of the jury is an apparent attempt by appellant to distract this Court's attention from the following facts upon which this issue may be easily resolved:

1) Mrs. Hendrix volunteered during her cross-examination by the prosecutor that she could acquire the records which he sought during his cross-examination. Curiously, Mrs. Hendrix had employed this tactic earlier during her cross-examination when she first unresponsively volunteered that she had the deed to the Hendrix house in Elmhurst, Queens (13:152-53);

2) Appellant fails to demonstrate how in fact he was prejudiced by Judge Mishler's offer to Mrs. Hendrix that she call her brother in Atlanta for the information the prosecutor sought during cross-examination and which she volunteered to provide. Mrs. Hendrix simply reported back to the Court and jury that she had reached by telephone the Atlanta boutique but that her brother was not available at that time. How this routine series of events prejudiced appellant or amounted to a showing of disbelief by the District Court in appellant's defense is not explained by appellant.

Clearly, the patently false testimony of Mrs. Hendrix was apparent virtually from the moment she assumed the witness stand. Appellant now attempts to undo that damage by accusing Judge Mishler of improper intervention during the course of the trial. This claim must be summarily rejected.

CONCLUSION

The judgment of conviction should be affirmed.

July 26, 1974

Respectfully submitted,

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* The United States Attorney's Office wishes to acknowledge the assistance of Renton L. K. Nip, a third year law student at Columbia University Law School in the preparation of this brief.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 29th day of July 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~at~~ two copies of the brief for the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Michael Young, Esq.
Federal Defender Services Unit
The Legal Aid Society
606 U. S. Court House
Foley Square
New York, NY 10007

worn to before me this 29th day of July 1974

Handwritten signature of Notary Public

Handwritten signature of Deborah J. Amundsen
DEBORAH J. AMUNDSEN

Notary Public, State of New York
No. 24-0683765
Qualified in Kings County
Next to filed in New York County
Commission Expires March 20, 1975

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19____

United States Attorney,
Attorney for _____

To:

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,

United States Attorney,
Attorney for _____

To:

Attorney for _____

----- Action No.-----

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____ is hereby admitted.

Dated: _____, 19____

Attorney for _____

URT